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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Jose Javier Merced,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.
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No. CV-22-01232-PHX-DWL

ORDER

15 On July 22, 2022, Petitioner filed a document entitled “Special Action,” which was
16 docketed as a petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1.) Later,
17 on August 29, 2022, Petitioner filed an amended § 2254 petition (“the Amended Petition”).
18 (Doc. 4.) Additionally, after Respondents filed a response to the Amended Petition (Doc.
19 12), Petitioner filed a motion to strike the response. (Doc. 13.)

20 On May 26, 2023, Magistrate Judge Boyle issued a report and recommendation
21 (“R&R”) concluding that the Amended Petition should be denied and dismissed with
22 prejudice and that the motion to strike should be denied. (Doc. 19.) Afterward, Petitioner
23 filed objections to the R&R (Doc. 20) and Respondents filed a response (Doc. 21).

24 For the following reasons, the Court overrules Petitioner’s objections, adopts the
25 R&R, and terminates this action.

26 **I. Background**

27 *The Charges, Guilty Plea, And Sentencing.* In June 2016, Petitioner was indicted
28 on five counts of sexual exploitation of a minor and one count of sexual conduct with a

1 minor. (Doc. 19 at 2.)

2 In August 2019, Petitioner pleaded guilty to three counts of attempted sexual
3 exploitation of a minor. (*Id.*) The plea agreement stipulated to a sentence of 10-15 years
4 on one of the counts and sentences of lifetime probation as to the other two counts. (*Id.*)

5 On October 10, 2019, the sentencing hearing took place. (*Id.*) Petitioner received
6 a sentence of 14.5 years to be followed by lifetime probation, which was consistent with
7 the plea agreement. (*Id.*) Additionally, Petitioner was provided “notice at sentencing that
8 he was required to file a PCR notice within 90 days of the oral pronouncement of sentence.”
9 (*Id.* at 5, quotation marks omitted).

10 *First PCR Proceeding.* Petitioner did not file a PCR notice within 90 days of the
11 oral pronouncement of sentence. (*Id.* at 2.) Instead, Petitioner signed his first PCR notice
12 on August 20, 2020 and filed it on August 31, 2020. (*Id.*) This was more than 10 months
13 after sentencing. (*Id.* at 4.) On September 29, 2020, the superior court dismissed
14 Petitioner’s PCR notice. (*Id.* at 2.)

15 *Subsequent State-Court Proceedings.* On May 17, 2021, Petitioner filed a “special
16 action” with the Arizona Court of Appeals. (*Id.*) On May 19, 2021, that court declined to
17 accept jurisdiction. (*Id.*) On June 30, 2021, that court denied Petitioner’s motion for
18 reconsideration. (*Id.*)

19 On July 12, 2021, Petitioner filed a “application for writ of habeas corpus” in the
20 Arizona Supreme Court. (*Id.*) On September 22, 2021, that court denied the motion. (*Id.*
21 at 3.)

22 *This Action.* On July 19, 2022, Petitioner initiated this action. (Doc. 1.) The Court
23 previously explained that the Amended Petition raises three grounds for relief:

24 In Ground One, [Petitioner] alleges a violation of his Fifth Amendment rights
25 in connection with his post-conviction proceedings. In Ground Two, he
26 alleges violation of his Sixth, Eighth, Ninth, and Fourteenth Amendment
27 rights to due process, to equal protection, and to be free from double
28 jeopardy. In Ground Three, he alleges the prison librarian has hindered his
ability to make legal copies for the courts, and apparently alleges that he is
being denied the ability to seek assistance from other prisoners.

1 (Doc. 7 at 2.) However, the Court dismissed Ground Three at the screening stage “for lack
2 of jurisdiction because it contains a challenge to Petitioner’s conditions of confinement,
3 which is not a basis for relief from his conviction or sentence.” (*Id.*)

4 *The R&R.* The R&R concludes the Amended Petition should be denied and
5 dismissed with prejudice because it is time-barred by the statute of limitations. (Doc. 19.)
6 More specifically, the R&R states that AEDPA’s one-year limitations period began
7 running on January 8, 2020, which is 90 days after sentencing and thus when Petitioner’s
8 convictions and sentences became final under Arizona law. (*Id.* at 4.) The R&R further
9 notes that “Petitioner did not mail a habeas petition until July 19, 2022.” (*Id.*) Thus, the
10 R&R states that this habeas proceeding was untimely filed unless statutory tolling,
11 equitable tolling, and/or the actual innocence gateway apply. (*Id.* at 4-6.)

12 As for statutory tolling, the R&R concludes it is inapplicable because “Petitioner
13 filed his [PCR] notice more than seven months after his deadline” and thus Petitioner
14 “never ‘properly filed’ an application for post-conviction review.” (*Id.* at 4-5.)

15 As for equitable tolling, the R&R concludes that it, too, is unavailable. (*Id.* at 5-6.)
16 On this point, the R&R explains that Petitioner “had notice at sentencing” of the
17 requirement to file any PCR notice within 90 days and that Petitioner “fails to explain why
18 his PCR petition was seven months overdue.” (*Id.* at 5.) The R&R further notes that
19 Petitioner waited nearly eight months after the dismissal of his PCR notice to file a “special
20 action” in the Arizona Court of Appeals and fails to provide an explanation for that delay.
21 (*Id.* at 5-6.)

22 As for actual innocence, the R&R concludes that Petitioner has failed to make the
23 necessary showing, both because he “admitted his guilt when he pleaded guilty” and
24 because “[h]e does not argue actual innocence to this Court.” (*Id.* at 6.)

25 Finally, as for Petitioner’s motion to strike, the R&R liberally construes it as a
26 request for a stay pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), but concludes that a
27 *Rhines* stay is unwarranted because “Petitioner fails to explain or provide ‘good cause’ for
28 his failure to file a timely PCR petition” and “also fails to demonstrate that either claim is

1 potentially meritorious.” (*Id.* at 6-7.)

2 II. Legal Standard

3 A party may file written objections to an R&R within 14 days of being served with
4 a copy of it. Rules Governing Section 2254 Cases 8(b) (“Section 2254 Rules”). Those
5 objections must be “specific.” *See* Fed. R. Civ. P. 72(b)(2) (“Within 14 days after being
6 served with a copy of the recommended disposition, a party may serve and file specific
7 written objections to the proposed findings and recommendations.”). “The district judge
8 must determine de novo any part of the magistrate judge’s disposition that has been
9 properly objected to. The district judge may accept, reject, or modify the recommended
10 disposition; receive further evidence; or return the matter to the magistrate judge with
11 instructions.” *See* Fed. R. Civ. P. 72(b)(3).

12 District courts are not required to review any portion of an R&R to which no specific
13 objection has been made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) (“It does
14 not appear that Congress intended to require district court review of a magistrate’s factual
15 or legal conclusions, under a *de novo* or any other standard, when neither party objects to
16 those findings.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)
17 (“[T]he district judge must review the magistrate judge’s findings and recommendations
18 de novo if objection is made, but not otherwise.”). Thus, district judges need not review
19 an objection to an R&R that is general and non-specific. *See, e.g., Warling v. Ryan*, 2013
20 WL 5276367, *2 (D. Ariz. 2013) (“Because de novo review of an entire R & R would
21 defeat the efficiencies intended by Congress, a general objection ‘has the same effect as
22 would a failure to object.’”) (citations omitted); *Haley v. Stewart*, 2006 WL 1980649, *2
23 (D. Ariz. 2006) (“[G]eneral objections to an R & R are tantamount to no objection at all.”).

24 III. Analysis

25 Petitioner does not raise any specific objections to the R&R’s reasoning. (Doc. 20.)
26 Instead, Petitioner purports to break the R&R into sections and simply indicates that he
27 “concurs” with the analysis in some of those sections but “controverts” the analysis in
28 others. (*Id.* at 1-3.) In the “conclusion” of his filing, Petitioner adds that Respondents have

1 not responded to his attempts to seek a negotiated remedy and that “the state[’]s material
2 evidence does not coin[c]ide with the rules of law. The fact of the matter [is] that the 911
3 call was conducted 6 months after the Petitioner was already detained in the MCSO
4 custody. Is not ethical in accordance to the fundamentals of the U.S.C.A. in which the
5 country is founded on.” (*Id.* at 3.)

6 In response, Respondents argue that the Court need not review Petitioner’s
7 objections because they are non-specific and that the reference to the 911 call “is a merits-
8 based argument that this Court does not need to address since [Petitioner’s] petition is
9 untimely.” (Doc. 21 at 1-2.)

10 The Court agrees with Respondents. By simply indicating that he “controverts”
11 certain aspects of the R&R, without explaining why, Petitioner has forfeited any objection
12 to the R&R’s analysis. This is an impermissible general objection. At any rate, the Court
13 has reviewed the R&R’s analysis and agrees with it—Petitioner initiated this action more
14 than one year after his conviction became final and is not entitled to statutory or equitable
15 tolling or to relief under the actual innocence gateway. This action is thus time-barred.

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1 Accordingly, **IT IS ORDERED** that:

2 1. Petitioner's objections to the R&R (Doc. 20) are **overruled**.

3 2. The R&R (Doc. 19) is **accepted**.

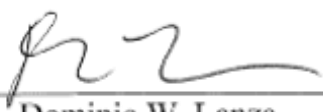
4 3. The Amended Petition (Doc. 4) is **denied and dismissed with prejudice**.

5 4. The motion to strike (Doc. 13) is **denied**.

6 5. A certificate of appealability and leave to proceed *in forma pauperis* on
7 appeal are **denied** because the denial of the Amended Petition is justified by a plain
8 procedural bar and jurists of reason would not find the procedural ruling debatable.

9 6. The Clerk shall enter judgment accordingly and terminate this action.

10 Dated this 26th day of June, 2023.

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Dominic W. Lanza
United States District Judge
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